UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPEAL NO. 20-16030

JOHN CAPRIOLE, MARTIN EL KOUSSA, and VLADIMIR LEONIDAS, individually and on behalf of others similarly situated,

Plaintiffs - Appellants

v.

UBER TECHNOLOGIES, INC.; DARA KHOSROWSHAHI,

Defendants - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 3:20-cv-2211-EMC
The Honorable Edward M. Chen

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and Local Rule 34(a), Plaintiff-Appellants respectfully request oral argument. The extremely important issues presented in this case include issues of first impression for this Court and implicate public well-being, and Appellants believe that oral argument will greatly assist the Court.

INTRODUCTION

This appeal raises substantial questions of both Massachusetts and federal law, regarding the availability of preliminary injunctive relief and a defendant's ability to thwart a preliminary injunction through the imposition of an arbitration agreement. This Court is tasked with deciding whether Defendant-Appellee Uber Technologies, Inc. ("Uber"), a behemoth global corporation, can perpetually avoid complying with Massachusetts law by wielding its arbitration agreement, even when its practices threaten to exacerbate a global pandemic. As various authorities have acknowledged, Uber's practice of misclassifying its drivers as independent contractors runs afoul of the "ABC" test contained in the Massachusetts Independent Contractor law, M.G.L. c. 149 § 148B, and unlawfully strips drivers of basic employee protections, including paid sick leave. Uber's business model – and that of the "gig economy" that it has ushered in – is premised on this misclassification. But now COVID-19 has toppled Uber's house of cards and revealed the undeniable damage done by Uber's degradation of labor standards, which impacts not only the drivers but the public at large as well, particularly given that Uber's denial of state-mandated sick pay (based upon their misclassification as independent contractors) is contributing to the spread of COVID-19 by compromising drivers' ability to stay home if they

are feeling sick. Uber's misclassification of its drivers can and should be enjoined now.

As described further below, the District Court had the power to, and should have, granted Plaintiffs' motion for a preliminary injunction, notwithstanding Uber's arbitration clause. The court could have entered a preliminary injunction before deciding whether Plaintiffs' claims would ultimately be compelled to arbitration. In any event, the court was wrong to decide that Uber's arbitration clause was enforceable against Plaintiffs' claims, both because Plaintiffs sought public injunctive relief, which cannot be thwarted through arbitration, see McGill v. Citibank, N.A., 2 Cal. 5th 945, 956 (2017)[1], and because Uber drivers are transportation workers who are exempt from the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, see Cunningham v. Lyft, Inc., 2020 WL 1503220, at *7 (D. Mass. March 27, 2020) (holding Lyft drivers to be exempt from FAA under transportation worker exemption), appeal pending Case No. 20-1357 (1st Cir.).[2]

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[1] In McGill, the California Supreme Court held that an arbitration agreement cannot thwart pursuit of public injunctive relief. Plaintiffs contend that Massachusetts law would follow California law on this point, and the Massachusetts Attorney General agrees. See discussion infra at Part III(A-B).

[2] But see Rogers v. Lyft, Inc., 2020 WL 1684151 (N.D. Cal. Apr. 7, 2020) (holding Lyft drivers not to be exempt from FAA under transportation worker exemption), appeal pending, Case No. 20-15689 (9th Cir.).

Uber is plainly a transportation company, and its drivers provide transportation services within the usual course of Uber's business, under Prong B of the three-part "ABC" test used in Massachusetts to determine employee status for the purposes of the Wage Act. See M.G.L. c. 149 § 148B.[3] The current version of the "ABC" test has been the law of the Commonwealth since 2004, when the Massachusetts legislature first enacted the strongest test in the country to combat misclassification. St. 2004, c. 193, § 26.[4] Massachusetts has consistently protected and reinforced the test,

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[3] In O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1144 (N.D. Cal. 2015), the court noted that "it strains credulity to argue that Uber is not a 'transportation company' or otherwise is not in the transportation business."). Other courts have likewise recognized the insincerity of such self-serving characterizations and "gig economy" companies' inability to satisfy Prong B. See Rogers v. Lyft, Inc., 2020 WL 1684151, at *1 ("While the status of Lyft drivers was previously uncertain, it is [] clear [under the "ABC" test] that drivers for companies like Lyft must be classified as employees."); id. at *2 ("drivers provide services that are squarely within the usual course of the company's business and Lyft's argument to the contrary is frivolous."); Cotter v. Lyft, 60 F.Supp.3d 1067, 1069 (N.D. Cal. 2015) ("[T]he argument that Lyft is merely a platform, and that drivers perform no service for Lyft, is not a serious one"); see also People of the State of California v. Maplebear, Inc., Case No. 2019-48731, at *4 (Cal. Sup. Ct. Feb. 18, 2020), appeal pending Case No. D077380 (Cal. App. 4th Dist.) (granting preliminary injunction, enjoining Instacart from classifying its shoppers as independent contractors, finding likelihood of success on the merits of claim that Instacart shoppers are employees under Prong B) [hereinafter "Instacart Injunction Order"] (Ex. B to concurrently filed Request for Judicial Notice [hereinafter RJN]).

[4] See, e.g., DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014) pp. 204-05; see also Deknatel & Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and*

recognizing the harm that independent contractor misclassification wreaks on the workplace, as well as the public at large, and has rejected attempts to weaken the test or cabin its application. See infra p. 24 n. 17.

However, in the face of legal challenges against Uber for misclassifying its Massachusetts drivers, see, e.g., Yucesoy v. Uber Techs., Inc. et al., C.A. No. 1:14-cv-13938 (D. Mass.), Uber has evaded enforcement efforts through repeated use of its arbitration agreement. A preliminary injunction requiring Uber to abide by the law and provide sick leave to its drivers (to which they would be entitled under state law as employees) could, quite literally, save lives; yet the District Court below found itself unable even to consider the request because of Uber's arbitration agreement. But a District Court is not required (nor should it be allowed) to abdicate its equitable powers under such dire circumstances due to an arbitration agreement. Although the U.S. Supreme Court has repeatedly countenanced the use of arbitration agreements to block class action litigation over the past decade, it has not addressed a situation such as this, where a defendant's conduct—even when blatantly violating state law in such a way that exacerbates a global pandemic—evades having that conduct

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Misclassification Statutes (2015) 18 U.PA. J.L. & SOC. Change 53 (both cited in Dynamex Operations W., Inc. v. Superior Court, 4 Cal.5th 903, 957-58 (2018)).

enjoined by use of an arbitration clause. The District Court should have adjudicated Plaintiffs' request for preliminary injunctive relief and, because Plaintiffs met the standard, it should have issued the injunction. Moreover, even if the court had to address the arbitration agreement in order to rule on the motion for preliminary injunction, it should have found it was not enforceable here. The court should thus also have denied Uber's motion to compel arbitration.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this case because diversity of citizenship exists between the putative class of Massachusetts Uber drivers and Defendant-Appellee Uber Technologies, Inc. ("Uber"), a Delaware corporation with its principal place of business in California, the number of proposed class members is 100 or greater, and the amount in controversy exceeds $5 million. See 28 U.S.C. §§ 1332(d), 1453.

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because this is an appeal from a final judgment. ER000003. This Court also has jurisdiction under 28 U.S.C. § 1292(a)(1) insofar as this is an appeal from an order denying preliminary injunctive relief, as entered by the District Court on May 14, 2020. ER000004-22. Plaintiffs' appeal is timely under Rule 4(a) of the Federal Rules of Appellate Procedure, because

Plaintiffs filed their Notice Appeal with the District Court on May 27, 2020, ER000001, within 30 days of the entry of the Orders denying the preliminary injunction and dismissing the case. ER000004-22, ER000001.

STATEMENT OF THE ISSUES

1. Whether Plaintiffs have established the prerequisites to obtain a preliminary injunction, enjoining Uber from continuing to misclassify its drivers as independent contractors and thereby denying them state-mandated sick pay during a global pandemic;
2. If the Court decides that the enforceability of Uber's arbitration clause needed to be addressed first, whether Uber can shield itself through arbitration from enforcement of Massachusetts wage law, under M.G.L. c. 149, § 148B, or whether Massachusetts law would follow the California Supreme Court's holding in McGill v. Citibank, N.A., 2 Cal. 5th 945 (2017), that a request for "public injunctive relief" cannot be thwarted by use of an arbitration agreement;
3. Whether Plaintiffs' request that Uber be ordered to properly classify its drivers as employees, so that they can obtain state-mandated sick pay during a global pandemic (thus assisting drivers who are feeling sick to stay home so they do not spread the coronavirus) constitutes such "public injunctive" relief;

4. Whether Plaintiffs' claims could not be compelled to arbitration in any event because Uber drivers are exempt from the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, under the Section 1 transportation worker exemption.

STATEMENT OF THE CASE

I. Procedural History

Plaintiff John Capriole filed this case in September 2019 in the United States District Court for the District of Massachusetts on behalf of himself and other individuals who have worked as Uber drivers in Massachusetts, alleging that Uber has misclassified them as independent contractors in violation of the Massachusetts Independent Contractor Law, M.G.L. c. 149 § 148B, and thus violated a number of provisions of the Massachusetts Wage Act. See D. Ct. Dkt 1.[5] Shortly thereafter, Plaintiff moved for a preliminary injunction, arguing that Uber's misclassification of its drivers harmed not only the drivers, but also the public at large, by degrading labor standards

[5] Plaintiff alleged that Uber has misclassified its drivers as independent contractors in violation of Mass. Gen. L. c. 149 § 148B and has thereby improperly required them to bear their own expenses, in violation of the Massachusetts Wage Law, Mass. Gen. L. c. 149 §§ 148, 150, and has further failed to ensure drivers receive minimum wage, in violation of the Massachusetts Minimum Wage Law, M.G.L. c. 151, § 1, and overtime pay for hours worked in excess of forty hours a week, in violation of the Massachusetts Overtime Law, Mass. Gen. L. c. 151, § 1A. ER000243, ¶ 2.

throughout the transportation industry and beyond, draining the public coffers (as taxpayers have been forced to foot the bill to support its workers who cannot provide for themselves and their families based upon their failure to receive basic wage protections), and engaging in unfair competition that harms law-abiding competitors. D. Ct. Dkt. 4. Plaintiff contended that Uber's violation of § 148B, which follows what is commonly known as the "ABC" test, was obvious. In particular, Uber cannot carry its burden under Prong B of the three-part test to prove that Uber drivers provide services outside Uber's usual course of business as a transportation company. Id.[6] It is really beyond dispute that the rides performed by drivers like Plaintiffs are within the usual course of Uber's business as a transportation service. See infra Part II(B)(1).

Uber opposed Plaintiffs' motion for a preliminary injunction and moved to compel arbitration or, in the alternative, requested that the action be transferred to the Northern District of California (based on a forum

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[6] As Plaintiff set forth, Uber is a transportation service that sells rides; Uber provides its customers with drivers who can be hailed and dispatched through Uber's mobile phone application. ER000246, ¶¶ 15-16. Uber bills itself as "your on-demand private driver." ER000246, ¶ 17. Uber riders use Uber's mobile phone application (the "Uber app") to hail a ride; the Uber app then assigns the ride to a driver. ER000247, ¶ 21. The rider pays Uber through the app, and Uber calculates and pays the driver pursuant to a formula Uber unilaterally controls. ER000246, ¶ 26.

selection clause in its arbitration agreement). D. Ct. Dkts. 10-12. The Court held oral argument on both Plaintiffs' and Defendants' motions on December 4, 2019. D. Ct. Dkt. 28.

While awaiting a decision on the motions, the landscape of life and work abruptly shifted. On March 11, 2020, the World Health Organization declared the spread of COVID-19 a global pandemic.[7] Public health agencies began to issue directives that anyone who feels ill should stay at home and not go to work and that people should begin social distancing (with an exception for essential workers, like Uber drivers, who were permitted to continue working).[8] Recognizing that the pandemic heightened the harm wrought by Uber's misclassification, Plaintiff Capriole moved to amend his complaint to add a claim for paid sick leave and filed a new request for an emergency preliminary injunction. D. Ct. 35 (Emergency Motion to Amend; ER000854-76.

Plaintiff filed his First Amended Complaint on March 19, 2020, alleging that Uber's ongoing refusal to provide drivers earned sick leave is

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[7] World Health Organization, WHO Director-General's opening remarks at the media briefing on COVID19-11 March 2020, https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-mediabriefing-on-covid-19---11-march-2020 (last accessed March 11, 2020).

[8] See *What to Do If You Are Sick*, Ctr. For Disease Control and Prevention, updated May 8, 2020, https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html.

in violation of the Massachusetts Earned Sick Time Law ("MESTL"), M.G.L. c. 149 § 148C. ER000890-902.[9] MESTL mandates that employees accrue sick leave at a rate of at least one hour of sick time for every thirty hours worked; Plaintiff alleged that Uber, as a matter of policy, denies all drivers accrued sick leave. ER000890, ¶ 3. On March 23, 2020, Plaintiff filed an Emergency Motion for a Preliminary Injunction, alleging that Uber's misclassification of its drivers, and thereby denying them state-mandated paid sick leave, was exacerbating the global pandemic and required immediate redress. ER000854. On April 10, 2020, Plaintiff amended his complaint again, adding Plaintiffs Martin El Koussa and Vladimir Leonidas, both drivers who had experienced COVID-19 symptoms but continued driving because they needed the money and could not afford to stay home and not work, due to lack of paid sick leave. ER000242-55.

On March 20, 2020, the District Court in Massachusetts denied Plaintiff Capriole's first request for a preliminary injunction, see D. Ct. Dkt. 41, and granted Uber's motion to transfer the case to the Northern District of California. D. Ct. Dkt. 56.[10]

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[9] Plaintiff filed an emergency motion to amend the complaint on March 12, 2020, D. Ct. Dkt. 35, which the Court granted on March 13, 2020. D. Ct. Dkt. 36.

[10] Plaintiff Capriole appealed the denial of his first motion for preliminary injunction to the First Circuit, where the appeal is now pending.

Thus, Plaintiffs' new motion, seeking an emergency preliminary injunction for Uber's misclassification of its drivers which resulted in them being denied paid sick leave, was briefed and heard by the federal court in California. D. Ct. Dkt. 65. Uber again moved to compel arbitration and opposed the injunction request. D. Ct. Dkts. 67, 68. The District Court held a hearing on the motions on April 22, 2020, see . Ct. Dkts. 90, 95.

II. Plaintiffs' Second Request for Preliminary Injunction (Based Upon Uber's Denial of State-Mandated Sick Pay During the COVID-19 Pandemic)

In their second request for a preliminary injunction, Plaintiffs sought emergency relief, arguing that they easily satisfied all four requirements for obtaining a preliminary injunction: (1) Plaintiffs raised a serious question on the merits of their misclassification claim in light of Uber's obvious inability to carry its burden under Prong B of the "ABC" test, M.G.L. c. 149, § 148B, as well as their entitlement to paid sick leave under Massachusetts law; (2) Plaintiffs, other Uber drivers, and the general public will suffer irreparable injury in the absence of a preliminary injunction because Uber's refusal to provide drivers with state-mandated paid sick leave contributes to the spread

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See Case No. 20-1386 (1st Cir.). Both parties and the District Court agreed that the First Circuit maintained jurisdiction of the appeal despite the subsequent transfer and that the District Court should not hold the new preliminary injunction motion in abeyance pending the First Circuit appeal. See Dkts. 86-87.

of COVID-19; (3) such injury outweighs any harm to Uber if it is required to comply with the law, as Uber is a massive corporation that can afford to pay its workers in compliance with the law; and (4) enjoining Uber's unlawful conduct, which is exacerbating a global pandemic, will undoubtedly serve the public interest. ER000081-90. Plaintiffs emphasized the obviousness of the first factor, Part II(B)(1), and the urgency of the second factor: that lack of paid sick leave presented serious and irreparable harm to drivers and the public by contributing to the spread of COVID-19.

In recognition of this urgency, the Massachusetts Attorney General took the unusual step of submitting, at the district court level, an amicus submitted in support of Plaintiffs' Emergency Motion:

> Ride-sharing drivers are providing essential transportation services in the midst of a public health crisis, but they do so without necessary sick leave protections–leaving them in an untenable economic position that puts them at risk of endangering not only themselves and their families but the entire public. Paid sick leave would promote the public interest by helping to protect ride-sharing drivers and the public at large from exposure to COVID-19[.]

ER000842. Indeed, the experiences of Plaintiffs El Koussa and Leonidas bear out this fear. Both experienced COVID-19 symptoms but continued to driver for Uber, despite feeling ill, because of their financial precarity and lack of paid sick leave. ER000878, ¶ 7; ER000881, ¶¶ 4-10. Many Uber

drivers have echoed feeling the need to work through the pandemic, despite being sick, out of financial necessity.[11]

The public sounded the alarm bells. Articles warned of drivers becoming "vector[s]" of this life-threatening disease.[12] Fifteen Attorney Generals, including Massachusetts Attorney General Maura Healey, signed onto a letter urging companies to provide paid sick leave during the pandemic. ER000099-105. Two U.S. Senators similarly emphasized the importance of paid sick leave to protecting the public, and Massachusetts Senator Elizabeth Warren specifically wrote to Defendant Dara

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[11] Alexis C. Madrigal, *The Gig Economy Has Never Been Tested by a Pandemic*, the Atlantic, Feb. 28, 2020, https://www.theatlantic.com/technology/archive/2020/02/ coronavirus-gig-economy/607204/; See also Mariah Mitchell, *I Deliver Your Food, Don't I Deserve Basic Protections*, N.Y. TIMES, March 17, 2020, https://www.nytimes.com/2020/03/17/opinion/coronavirus-fooddelivery-workers.html?referringSource=articleShare (last accessed March 17, 2020); Tyler Sonnemaker, *'In order to Make a Living I must Put Myself and My Community in Danger': Uber Drivers Say the Company's Inconsistent Sick Pay Policy is Pushing Them to Keep Working – Even if They Get Sick*, BUSINESS INSIDER, Apr. 7, 2020, https://www.businessinsider.com/uber-drivers-coronavirus-pay-policy-pushingsick-drivers-to-work-2020-4; THE RIDESHARE GUY, March 17, 2020, https://therideshareguy.com/uber-drivers-cansurvive-the-coronavirus/ ("Sickness is not an option for me because not working is not an option. If I do get sick, I will have to continue to work or I will lose my ability to exist"); id. (""We need sick pay! How am I to pay my bills?").

[12] Alexis C. Madrigal, *The Gig Economy Has Never Been Tested by a Pandemic*, The Atlantic, Feb. 28, 2020 https://www.theatlantic.com/technology/archive/2020/02/coronavirusgig-economy/607204/ (cited ER000868, n. 24).

Khosrowshahi to urge that Uber provide paid sick leave in order to protect workers and the public. ER000106-108, ER000109-113. These pleas were based on a wealth of studies confirming that lack of state-mandated paid sick leave contributes to the spread of disease. ER000868-69.[13]

Plaintiffs further argued that: (1) the District Court had the authority to issue the preliminary injunction, notwithstanding questions of arbitrability; and that, even if the Court had to consider the enforceability of Uber's arbitration clause, the clause would not be enforceable because: (2) Plaintiffs' request constitutes public injunctive relief, and the Massachusetts Supreme Judicial Court would follow the California Supreme Court's decision in McGill v. Citibank, N.A., 2 Cal. 5th 945 (2017), which would not allow an arbitration clause to prevent the issuance of an injunction that is necessary for the public good[14]; and (3) Uber drivers are transportation

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[13] See, e.g., Stefan Pichler, Katherine Wen & Nicolas Ziebarth, *Positive Health Externalities of Mandating Paid Sick Leave,* ResearchGate, Feb. 2020, https://www.researchgate.net/publication/336832189_Positive_Health_Externalities_of_Mandati ng_Paid_Sick_Leave.

[14] Plaintiffs requested that the Court certify this issue to the Massachusetts Supreme Judicial Court. ER000076, n. 1. Just as the "McGill rule" was not known in California until the California Supreme Court had occasion to decide it, the federal court here does not know if this rule will apply in Massachusetts until the SJC has occasion to address it.

workers exempt from the Federal Arbitration Act, 9 U.S.C. § 1. ER000073-74.

In its May 14, 2020, Order, which Plaintiffs challenge in this appeal, the District Court denied Plaintiffs' emergency motion for injunctive relief. ER000004- ER000022. The court refused to adjudicate the preliminary injunction request prior to deciding Uber's motion to compel arbitration and then proceeded to grant the motion to compel arbitration, notwithstanding the fact that Plaintiffs are seeking a public injunction (which they contend Massachusetts law would not allow to be thwarted through arbitration) and despite Plaintiffs' contention that Uber drivers are exempt from the Federal Arbitration Act under the Section 1 transportation worker exemption.

SUMMARY OF THE ARGUMENT

The District Court erred in denying Plaintiffs' request for a preliminary injunction. First, the District Court had the power to grant preliminary injunctive relief, before even considering the enforceability of Uber's arbitration agreement. See infra, Part II(A). Because Plaintiffs easily satisfied all four requirements for obtaining a preliminary injunction, an injunction should have issued, based on the preliminary injunction standard

set forth in Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134–39 (9th Cir. 2011). See infra Part II(B).

Second, even if the District Court needed to consider arbitrability prior to ruling on the injunction, that would be no bar to an injunction because Plaintiffs' request constitutes public injunctive relief, which Plaintiffs may seek under the Massachusetts Wage Act and which Massachusetts law would not allow to be thwarted through the use of an arbitration clause. See infra Part III(A-B). Finally, Plaintiffs also cannot be compelled to arbitrate their claims against Uber because Uber drivers are exempt from the Federal Arbitration Act, under the Section 1 transportation worker exemption, 9 U.S.C. § 1. See infra Part III(C). For these same reasons, the court should have denied Uber's motion to compel arbitration.

ARGUMENT

I. Standard of Review

A. This Court Should Apply *De Novo* Review to the Issues on Appeal

In the Ninth Circuit, an "order granting or denying [a preliminary] injunction will be reversed only if the district court abused its discretion." Zepada v. United States I.N.S., 753 F. 2d 719, 724 (9th Cir. 1983). "A district judge may abuse his discretion [by] apply[ing] incorrect substantive

law or an incorrect preliminary injunction standard." Id. Whether the district court applied the correct substantive law or preliminary injunction standard is subject to *de novo* review. Toyo Tire Holdings of Americas Inc. v. Continental Tire North America, Inc., 609 F.3d 975, 979 (9th Cir. 2010). Questions of statutory interpretation, which may underly incorrect application of substantive law, are also reviewed *de novo*. United States v. Youssef, 547 F. 3d 1090, 1093 (9th Cir. 2008).

An order granting or denying a motion to compel arbitration is also subject to *de novo* review. Bushley v. Credit Suisse First Boston, 360 F.3d 1149, 1152 (9th Cir. 2004). An order compelling arbitration and dismissing the action is immediately appealable. Johnmohammadi v. Bloomingdale's, Inc., 755 F.3d 1072, 1073-73 (9th Cir. 2014).

Thus, both orders (the denial of the preliminary injunction and the granting of the motion to compel, which resulted in dismissal of the action ER000003) are immediately appealable and all aspects of the District Court's rulings below are subject to *de novo* review.

B. The Massachusetts Attorney General's Interpretation of the Wage Act is Entitled to Substantial Deference Upon Review

In an amicus brief filed in this case, the Massachusetts Attorney General agreed with Plaintiffs' interpretation of the Massachusetts Wage Act and Independent Contractor Law – both in that Plaintiffs had established a

high likelihood of success in showing that Uber violated Massachusetts law in classifying its drivers as independent contractors (since they perform services within Uber's usual course of business) – and that Massachusetts law provides for public injunctive relief, which the Attorney General agreed that Plaintiffs' request qualifies as. See ER000849-52. The Massachusetts Supreme Judicial Court has made clear that as "the department charged with enforcing wage and hour laws," the Attorney General's office's interpretation of the protections afforded under the Wage Act is "entitled to substantial deference, at least where it is not inconsistent with the plain language of the statutory provisions." Smith v. Winter Place, LLC, 447 Mass. 363, 367-38 (2006).[15]

II. The District Court Erred in Denying Plaintiffs' Request for a Preliminary Injunction

A. The District Court Had the Authority to Issue a Preliminary Injunction, Notwithstanding Uber's Pending Motion to Compel Arbitration

The District Court misread Ninth Circuit case law in holding that "[i]t would not be appropriate to plow ahead on the motion for a preliminary injunction before ruling on [Defendant's] motion to compel." ER000011 (quoting Rogers v. Lyft, Inc., 2020 WL 1684151, at *3 (N.D. Cal. Apr. 7,

[15] See also Camara v. Attorney General, 458 Mass. 756, 769-71 (2011); Electronic Data Systems Corp. v. Attorney General, 454 Mass. 63, 67-69, 71 (2009).

2020)). The District Court cited to Toyo Tire Holdings Of Americas Inc. v. Cont'l Tire N. Am., Inc., 609 F.3d 975, 981 (9th Cir. 2010), as establishing that a "district court may issue interim injunctive relief on arbitrable claims if interim relief is necessary to preserve the status quo and the meaningfulness of the arbitration process" and appears to have misread this language as limiting its ability to issue preliminary injunctive relief. This reading of the case and its application to the facts was misguided.

First, in Toyo Tires, the Ninth Circuit specifically considered the question of whether a district court maintained its equitable power to issue preliminary injunctive relief when (1) the parties had agreed to arbitrate the claims and (2) the arbitrator had the ability to grant interim injunctive relief. 609 F.3d at 979-80. In contrast, here, the explicit terms of Uber's arbitration agreement *foreclose* the arbitrator awarding Plaintiffs the injunctive relief they seek – namely an order enjoining Uber from misclassifying its drivers as independent contractors and providing them with paid sick leave, so as to protect themselves and the public from spread of the coronavirus. ER000767 ("The Arbitrator shall have no authority to consider or resolve any claim or issue any relief on any basis other than an individual basis."). This case thus presents a distinct question from that decided in Toyo Tire or its predecessor Simula, Inc. v. Autoliv, Inc., 175 F. 3d 716 (9th Cir. 1999),

insofar as Plaintiffs seek injunctive relief that is, in fact, altogether unavailable to them in the arbitral forum. See Part III(B) (explaining why Plaintiffs' request constitutes public injunctive relief).

In any event, Toyo Tire does not establish a limitation on a district court's power to grant preliminary injunctive relief simply because there is a pending motion to compel arbitration. Instead, Toyo Tire is an affirmation and expansion of the holding rendered by the Ninth Circuit in PMS Distributing Co. v. Huber & Suhner, A.G., 863 F.2d 639, 641-42 (9th Cir. 1988), which held that district courts retain jurisdiction and are empowered to grant preliminary relief even after an order compelling arbitration. In PMS Distributing, the Ninth Circuit expressly followed the reasoning set forth by the First Circuit: "[A] district court can grant injunctive relief in an arbitrable dispute pending arbitration, provided the prerequisites for injunctive relief are satisfied." Id. at 641-42 (quoting Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 51 (1st Cir.1986)). The Ninth Circuit explicitly "adopt[ed] the approach of the Seventh, Second, and First Circuits as indicated". Id. at 642. Subsequent case law (including a prior decision by the District Court in Massachusetts in this case) makes clear that under this majority approach, preliminary injunctive relief remains available despite even if the claim may be subject to arbitration. See Capriole v. Uber Techs.

Inc., 2020 WL 1323076, at *1 (D. Mass. March 20, 2020), appeal pending Case No. 20-1386 (1st Cir.) (adjudicating preliminary injunction motion prior to motion to compel arbitration and citing Next Step Medical co., Inc. v. Johnson & Johnson Intern., 619 F.3 67, 70 (1st Cir. 2010)); see also Cunningham v. Lyft, Inc., 2020 WL 1323101, at *1 (D. Mass. March 20, 2020), appeal pending, Case No. 20-1379 (1st Cir.) (same); Braintree Laboratories, 622 F.3d 36, 40 (1st Cir. 2010) ("District courts have the authority to issue injunctive relief even where resolution of the case on the merits is bound for arbitration.").[16]

Importantly, the preliminary injunction analysis remains unaltered even where a party's preliminary injunctive relief request seeks to alter the

[16] A wealth of precedent across Circuits, including the Seventh and Second, which this Circuit explicitly adopted in PMS Distributing, supports the District Court's ability to adjudicate a preliminary injunction motion or issue a preliminary injunction *prior* to deciding a motion to compel arbitration. See Janvey v. Aguire, 647 F. 3d 585, 593-95 (2d Cir. 2011); Performance Unlimited, Inc. v. Questar Publishers, Inc., 52 F.3d 1373, 1380 (6th Cir. 1995) ("We adopt the reasoning of the First, Second, Third, Fourth, Seventh, and arguably the Ninth, Circuits and hold that in a dispute subject to mandatory arbitration under the Federal Arbitration Act, a district court has subject matter jurisdiction under § 3 of the Act to grant preliminary injunctive relief provided that the party seeking the relief satisfies the four criteria which are prerequisites to the grant of such relief"); Ortho Pharmaceutical Corp. v. Amgen, Inc., 882 F. 2d 806, 812, 814 (3d Cir. 1989); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dutton, 844 F.2d 726, 727 (10th Cir. 1988); Roso-Lino Beverage Distributors Inc. v. Coca-Cola Bottling Co. of New York, 749 F. 2d 124, 125 (2d Cir. 1984); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048, 1052 (4th Cir. 1985); Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 350 (7th Cir. 1983).

status quo. See Braintree Laboratories, 622 F.3d 36, 40-41 (1st Cir. 2010) (holding that, even where issues of arbitrability loom, "the exigencies should still be measured according to the same four-factor test, as '[t]he focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.'") (quoting Crowley v. Local No. 82, 679 F.2d 978, 996 (1st Cir. 1982), rev'd on other grounds by 467 U.S. 526, 104 S.Ct. 2557, 81 L.Ed.2d 457 (1984) (quoting Canal Auth. v. Callaway, 489 F.2d 567, 576 (5th Cir.1974)). The Ninth Circuit appears to have agreed that, as long as jurisdiction remains, the analysis to determine whether a plaintiff has established a need for interim relief should remain unaltered. PMS Distributing, 863 F.2d at 642 ("The fact that a dispute is arbitrable and that the court so orders … does not strip it of authority to grant a writ of possession pending the outcome of the arbitration so long as the criteria for such a writ are met.") (emphasis supplied). The Toyo Tire case sought to enlarge district courts' understanding of their equitable powers under PMS Distributing:

> The importance of the courts' ability to issue interim injunctive relief is even more apparent now than when we decided PMS twenty-two years ago. We assume that parties ordinarily choose to arbitrate [] to lower costs and increase efficiency and speed. However, arbitration's promised speed and efficiency frequently do not materialize in practice. Moreover, one party to the arbitration often has an incentive to delay arbitration proceedings to its own advantage.

Toyo Tire, 609 F.3d at 980-81 (internal citations omitted). Indeed, Uber's actions have realized the very concern articulated by the Ninth Circuit in Toyo Tire: Uber has, thus far, successfully delayed adjudication on its misclassification claim by wielding its arbitration agreement.

Courts need not countenance this strategy. Indeed, a court in California recently issued a preliminary injunction enjoining another gig economy company, Instacart, from continuing to misclassify its workers as independent contractors under the "ABC" test that California has adopted from Massachusetts, *before* addressing the company's motion to compel arbitration. See People of the State of California v. Maplebear, Inc., Case No. 2019-48731, at *2, 4 (Cal. Sup. Ct. Feb. 18, 2020), appeal pending Case No. D077380 (Call. App. 4th Dist.). The District Court here was wrong to find itself precluded from issuing a preliminary injunction, and this Court should therefore reverse and hold that the District Court should have considered the merits of Plaintiffs' motion.

B. Plaintiffs Established the Four Factors Required for a Preliminary Injunction

1. Plaintiffs raised "serious questions" as to the merits

Plaintiffs easily satisfied the first factor needed for a preliminary injunction to issue: raising a "serious question" on the merits of their misclassification claim. See Cottrell, 632 F.3d at 1134–39 (explaining the

Ninth Circuit's sliding scale approach when Plaintiffs establish that the balance of equities tips in their favor, see infra Part II(B)(3)).

Under the Massachusetts "ABC" test, workers who perform services for a putative employer are presumed to be employees, unless the defendant can prove all three prongs of the "ABC" test. See M.G.L. c. 149 § 148B; Somers v. Converged Access, Inc., 454 Mass. 582, 590–91 (2009). The Massachusetts Supreme Judicial Court has repeatedly affirmed the strictness and strength of the test, rejecting attempts to cabin its application or water down application of individual prongs.[17]

Here, the likelihood of success factor is particularly strong under the second prong of § 148B ("Prong B"), which requires Uber to show "the service is performed outside the usual course of the business of the employer." M.G.L. c. § 148B(a)(2).[18] Despite Uber's attempt to portray

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[17] See, e.g., Somers, 454 Mass. at 590–91 (affirming particular strength of "ABC" test and its importance to the Commonwealth in combatting misclassification); Carey v. Gatehouse Media Massachusetts I, Inc., 92 Mass. App. Ct. 801, 807, 813–14 (2018) (reiterating strength of "ABC" test and affirming grant of summary judgment to plaintiffs under Prong B based on employer's self-description and workers' provision of necessary services); Depianti v. Jan-Pro Franchising Intern., Inc., 465 Mass. 607, 623-24 (2013) (refusing to allow an "end run" application of the "ABC" test through a "multi-tier" private agreement).

[18] The test requires the putative employer prove all three of these prongs: "[A] the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and [B] the service is performed outside the usual course of the business of the employer; and, [C] the individual is

itself as a "technology platform", rather than a transportation company, it will not be able to deny that it is in the same course of business as its vast legion of drivers, as numerous courts have foreshadowed. See Rogers v. Lyft, Inc., 2020 WL 1684151, at *1 ("While the status of Lyft drivers was previously uncertain, it is [] clear [under the "ABC" test] that drivers for companies like Lyft must be classified as employees."); id. at *2 ("drivers provide services that are squarely within the usual course of the company's business and Lyft's argument to the contrary is frivolous."); Cotter v. Lyft, 60 F.Supp.3d 1067, 1069 (N.D. Cal. 2015) ("[T]he argument that Lyft is merely a platform, and that drivers perform no service for Lyft, is not a serious one").[19]

In its amicus brief filed in this case, the Massachusetts Attorney General urged the District Court to enjoin Uber's misclassification of its drivers, likewise recognizing that Uber cannot satisfy Prong B of the "ABC" test. ER000842, ER000852.[20] The company has held itself out as a

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customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed." M.G.L. c. 149 § 148B.

[19] Making this conclusion all the more obvious, Uber drivers have already been held to be employees under the "ABC" test by the California Public Utilities Commission, see Ex. C to RJN.

[20] See also People of the State of California v. Uber Techs. Inc, et al., Case No. CGC-20-584401 (Cal. Sup. Ct.) (filed June 25, 2020) (Ex. A to

transportation company[21], and it is treated and behaves as a transportation company.[22] Because the "ABC" test is conjunctive and a defendant's failure to carry its burden under Prong B is dispositive, Massachusetts courts regularly grant summary judgment on employee status based on an alleged employer's inability to carry its burden under Prong B.[23] There can be no

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RJN) (California Attorney General asserted in motion for preliminary injunction seeking classification of Uber drivers as employees, "The plain facts compel the conclusion that [Uber's] "usual course" of business is providing rides to Passengers."). Notably, California recently adopted Massachusetts "ABC" test for combatting independent contractor misclassification, first through the Supreme Court's decision in Dynamex Operations W., Inc. v. Superior Court, 4 Cal.5th 903, 957-58 (2018), and then through the legislature's codification of the standard in Assembly Bill No. 5 ("AB 5"), enacting Cal. Lab. Code § 2750.3. It has been widely recognized that the California legislature specifically adopted the Massachusetts "ABC" test with the understanding that it would force companies such as Uber to classify their drivers as employees. Kate Conger and Noam Scheiber, *California Bill Makes App-Based Companies Treat Workers as Employees*, N.Y. TIMES, Sept. 11, 2019 ("California legislators approved a landmark bill on Tuesday that requires **companies like Uber** and Lyft to treat contract workers as employees") (emphasis supplied).

[21] See Cal. AG Mot. at 22 (Ex. A to RJN) (noting Uber trademarked the slogan "Everyone's Private Driver").

[22] See ER000846 (noting that Uber has been classified as a Transportation Network Company and referring to Uber as providing essential transportation services; and generates revenue from transportation services, by taking a cut of each driver's fare), see M.G.L. c. 159A1/2 § 1 and M.G.L. c. 25 § 23 (requiring Uber to pay a per ride surcharge); see Cal. AG Mot. at 22 (Ex. A to RJN).

[23] Massachusetts courts have frequently looked to logic and commonsense in determining a defendant's usual course of business and finding liability for misclassification based upon the defendant's inability to

serious question here that Plaintiffs established a serious question on the merits of showing that Uber drivers have been misclassified under Massachusetts independent contractor misclassification law.[24]

2. Plaintiffs established that Uber's misclassification of drivers causes irreparable harm to drivers and the public

Plaintiff established irreparable harm flowing from Uber's misclassification of drivers both to the drivers and to the public at large.

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establish Prong B. See, e.g., Carey v. Gatehouse, 92 Mass. App. Ct. 801, 807, 813–14 (2018) (affirming summary judgment to newspaper delivery drivers, considering such factors as how the business holds itself out and whether the services provided by the plaintiffs are core to the business or merely incidental); Schwann v. FedEx Ground Package Sys., Inc., 2013 WL 3353776, *5 (D. Mass. July 3, 2013) (rejecting FedEx's attempt to characterize itself as a "logistics" company rather than a "delivery" company; " FedEx advertises that it offers package pick-up and delivery services and its customers have no reason to believe otherwise"), rev'd on other grounds, 813 F.3d 429 (1st Cir. 2016); Awuah v. Coverall North Am., 707 F.Supp.2d 80 (D. Mass. 2010) (rejecting defendant's contention that it was in the "franchising" business, rather than the cleaning business); Chaves v. King Arthur's Lounge, 2009 WL 3188948, *1 (Mass Super. July 30, 2009) (holding that adult entertainment was, based on common sense, the defendant strip club's usual course of business).

[24] Plaintiffs also established at least a likelihood of prevailing on the success of their arguments that Uber's arbitration clause should not have prevented him from obtaining the injunction. These arguments are addressed infra Part II(B)(1).

a. Uber's misclassification causes irreparable harm to its drivers

Uber's misclassification of its drivers causes substantial injury to the drivers. Loss of basic employee protections cannot be remedied after the fact. For instance, later monetary damages cannot remedy the harm inflicted on drivers when Uber denies drivers paid sick leave. If a driver is forced to continue working because he cannot afford to stay home, without paid sick leave, the harm of having continued to work through illness – particularly during a pandemic – cannot be remedied later through monetary damages. Moreover, Massachusetts law allows paid sick leave to be used for preventative care, M.G.L. c. 149 § 148C(c), which would allow drivers to spend more time at home during the pandemic if their concern is not spreading the virus but instead contracting the virus themselves from passengers. Indeed, Uber drivers have been particularly vulnerable during the crisis, as their job requires them to come into close interaction with the public. Any additional time they can afford to stay home, as would be allowed even by the modest amount of paid sick leave provided by Massachusetts law (40 hours), M.G.L. c. 149 § 148C(d)(4), can incrementally save lives.[25]

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[25] Indeed, the youngest known victim of the coronavirus in Massachusetts (at the time at least) was an Uber driver. Dugan Arnett &

COVID-19 has made abundantly clear that basic employee protections like paid sick leave *prevent* a range of harms – immediate destitution (that can cascade into bad credits, missed meals, eviction), deprivation of dignity, and a total undoing of health – that companies cannot erase through later payment.[26]

Nevertheless, Uber may persist that drivers are, at bottom, seeking a money payment for time missed while sick. But courts have recognized that an employee's failure to receive wages when due can comprise "irreparable injury" in extreme circumstances (which Uber drivers are obviously now working under).[27] Further, courts have found that a defendant's failure to

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Nestor Ramos, *31 and Sturdy, Until coronavirus Hit: Youngest Massachusetts Victim to Date Succumbs*, The Boston Globe, Apr. 1, 2020, https://www.bostonglobe.com/2020/04/01/nation/youngest-massachusetts-coronavirus-victim-succumbs-31/?event=event12.

[26] Moreover, that the Earned Sick Time Law provides for injunctive relief, through M.G.L. c. 149 § 150, suggests Plaintiffs may not be required to show irreparable harm at all, in light of a presumption that any violation of the statute constitutes irreparable harm. See American Fruit Growers, Inc., v. United States, 105 F.2d 722, 725 (9th Cir. 1939). See also Atchison, T. & S.F. Ry. Co. v. Lennen, 640 F.2d 255, 258–259 (10th Cir.1981) ("it is not necessary that the [Plaintiff] Railroads show that they will suffer irreparable harm if the injunction is denied. When the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm to the plaintiffs need not be shown.").

[27] See, e.g., Roland Machinery Co. v. Dresser Industries, Inc., 749 F. 2d 380, 386 (7th Cir. 1984) (finding irreparable harm when damages "may come too late to save plaintiff's business. He may go broke while waiting, or may have to shut down his business"); Donohue v. Mangano, 886 F. Supp.

make payments that negatively impact a plaintiff's health, whether by preventing the plaintiff from being able to seek treatment or comply with treatment, can likewise constitute irreparable harm. See ER000866 (collecting cases).[28] Dangerous working conditions can also constitute irreparable harm. See, e.g., Dominion Energy Transmission, Inc. v. 0.11 Acres of Land, More or Less, in Doddridge Cty, W. Va., 2019 WL 4781872 at *5 (N.D. W. Va. Sept. 30, 2019).

2d 126, 153-54 (E.D.N.Y. 2012) ("'For a poor man ... to lose part of his salary often means his family will go without the essentials.'") (quoting Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 342 n. 9, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) (quoting statement of Congressman Gonzales, 114 Cong. Rec. 1833)); Aguilar v. BaineService Systems, Inc., 538 F. Supp. 581, 584 (S.D.N.Y. 1982) (finding a showing of irreparable harm under Rule 65 due to lost wages).

[28] See Harris v. Blue Cross Blue Shield of Missouri, 995 F. 2d 877, 878-79 (8th Cir. 1993) (finding irreparable harm when plaintiff was denied insurance coverage that could provide "the only possibility of long-term control or care" of plaintiffs' health); Boldon v. Humana Ins. Co., 466 F. Supp. 2d 1199, 1207-1208 (D. Ariz. 2006) (finding also that denial of insurance coverage constitutes irreparable harm when plaintiff faced liver-threatening liver cancer); B.E. v. Teeter, 2016 WL 3033500 at *5 (W.D. Wash. May 27, 2016) (finding that denial of Medicaid services constituted irreparable harm because it creates "(1) substantial risk to plaintiffs' health; (2) severe financial hardship; (3) inability to purchase life's necessities; and (4) anxiety associated with uncertainty") (quoting LaForest v. Former Clean Air Holding Co., Inc., 376 F. 3d 48, 55 (2d Cir. 2004)); International Schools Services, Inc. v. AAUG Ins. Co., Ltd., 2010 WL 4810847, at *5 (S. D. Fla. Nov. 19, 2010) (finding irreparable harm to employees when health care insurer stopped covering payment of claims; "[t]he death of a child, the loss of a limb, or prolonged suffering due to lack of treatment cannot be undone by monetary means") (internal quotation marks and citation omitted); Sluiter v. Blue Cross Blue Shield of Mich., 979 F. Supp. 1131, 1145 (E.D. Mich. 1997) ("each plaintiff will suffer irreparable harm without this preliminary injunction because she will be unable to receive the course of treatment recommended by her physician").

Both the Massachusetts and California Attorney Generals have agreed that Uber's misclassification of its drivers results in irreparable harm to the drivers. See ER000849-52; Cal. AG Mot. at 33-37 (Ex. A to RJN). As the Massachusetts Attorney General recognized, lack of paid sick leave means that "drivers face the untenable position of choosing to continue providing transportation services to members of the public while they, or their household family members, are in compromised medical condition or risk losing all means of financial support." ER000852. And as the California Attorney General has explained: "When economically vulnerable Drivers are denied their legally required wages and benefits, they are left precariously juggling the necessities of life, including food, housing, and transportation," and are left unable to meet their basic needs. Cal. AG Mot. at 37 (Ex. A to RJN) (internal citations omitted). The harm to the drivers is apparent.

b. Uber's misclassification of its drivers also causes irreparable harm to the public

The harm done to the public as a result of Uber's misclassification of its drivers and denial of paid sick leave during a pandemic cannot be understated.[29] First, misclassification harms the public – period – because of

[29] The District Court only cursorily considered harm to the public in evaluating Plaintiffs' argument that they sought public injunctive relief within the meaning of McGill, which Plaintiffs address infra Part III(B).

the general degradation of labor standards, drain on the public coffers, and harm to law-abiding competitors. ER000865, n. 22; Somers, 454 Mass. at 590-91 (2009) ("Misclassification not only hurts the individual employee; it also imposes significant financial burdens on the Federal government and the Commonwealth in lost tax and insurance revenues. Moreover, it gives an employer who misclassifies employees as independent contractors an unfair competitive advantage over employers who correctly classify their employees and bear the concomitant financial burden.").[30] As the Attorney General acknowledged in her amicus brief "[i]ndependent contractor misclassification remains a persistent economic problem", which in particular degrades the transportation industry in Massachusetts. ER000843. The California Attorney General has likewise asserted, "an astonishing range of violations and associated harms—to Drivers, law-abiding businesses, and the public—flow from [Uber's] unlawful misclassification of their Drivers. (See Dynamex, supra, 4 Cal.5th at pp. 912–913.)." Cal. AG

[30] See also Depianti v. Jan-Pro Franchising Intern., Inc., 465 Mass. 607, 620-21 (2013) (quoting language from Somers); *An Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149, s. 148B*, 2008/1, AGO 1 ("The need for proper classification of individuals in the workplaces if of paramount importance to the Commonwealth"); Executive Order No. 499: Establishing a Joint Enforcement Task Force on the Underground Economy and Employee Misclassification, (Mass Register 1101), https://www.mass.gov/executive-orders/no-499-establishing-a-joint-enforcement-task-force-on-the-underground-economy-and (listing harms to the public).

Mot. at 32, 40 (listing harm to workers, law-abiding competitors, and the public made to subsidize these unlawful business practices by funding social safety nets drivers are forced to avail themselves of in order to survive) (Ex. A to RJN); see also A.B. 5 § 1, subd. (c). (declaring independent contractor misclassification contributes to "the erosion of the middle class and the rise in income inequality.").[31] This degradation of labor standards alone constitutes irreparable harm to the public. See Maplebear, Inc., Case No. 2019-48731, at *4 (Ex. B to RJN) (finding that workers "and the public will be irreparably harmed [by Instacart's misclassification] unless a preliminary injunction" issues).

Now Uber's refusal to provide its drivers with paid sick leave, as mandated under Massachusetts law, has created an even more acute type of irreparable harm to the public by undermining an important public health tool at a time when public health tools are most urgently needed (and should be most strictly enforced). Massachusetts allows employees to use paid sick leave without providing any documentation and to use it for preventative

[31] This ongoing injury to the public simply can never be remedied through later monetary damages. A later award of wages to its drivers will not re-pay for those social services for which taxpayers have footed the bill (and which could have gone towards funding other essential services). Nor would a later award of damages resurrect businesses that have shut down because they cannot compete with Uber's underpricing, or the insurrection of the "gig economy" that Uber ushered in.

care. M.G.L. c. 149 § 148C(c), (d)(4); 940 C.M.R. 33.06. The law reflects an important determination that paid sick leave should be freely available and accessible.

But Uber has flatly rejected that mandate, and now the entire gig economy industry has copied Uber's model and created a class of workers (who have largely been deemed essential during this pandemic), and whose lack of employee protections will impede the public fight against COVID-19 in blatant violation of the law. As the Massachusetts Attorney General articulated: "ride-sharing drivers, and the public they serve, face immediate threat of irreparable harm due to the [COVID-19] global health crisis." ER000045. Massachusetts has had 111,597 cases of COVID-19 and 8,325 deaths. See *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html?action=click&module=Top%20Stories&pgtype=Homepage (last accessed July 13, 2020). The Governor has declared COVID-19 a state of emergency and previously issued an executive order to shelter-in-place in order to "limit the spread of this highly contagious and potentially deadly virus. ER000045 (citing St. 1950, c. 639 and M.G.L. c. 17, § 2A and COVID-19 Executive Order No. 13 (Mar. 23, 2020), https://www.mass.gov/doc/march23-2020-essential-services-and-revised-

gatherings-order/download. The Commonwealth has only now begun re-opening its economy in phased steps. See generally The Re-opening Massachusetts Report, Mass.Gov, May 18, 2020, https://www.mass.gov/doc/reopening-massachusetts-may-18-2020/download. Through it all, Uber drivers have continued to work, as they have been deemed essential workers. ER000072, n. 7.

Uber argues that there is no emergency or irreparable injury because of its voluntary practices, even though its ad hoc emergency sick leave system does not satisfy state sick pay law. ER000823-24. For example, Uber's system included stringent documentation requirements that contravene Massachusetts law, which provides that employers can only request documentation from employees after the workers have been absent three consecutive days. Compare 940 Mass. Code Regs. § 33.06(1, 2) with [Dkt. 80-4] (attesting to being denied Uber's COVID-19 paid sick leave, despite qualifying, due to difficulties providing the correct documentation).

Uber also argued to the District Court that emergency federal legislation showed that there was no irreparable harm here because emergency federal benefits would ameliorate the harm to drivers and the public by providing tax sick leave credits, family leave tax credits, unemployment benefits, and possible small business loans, to independent

contractors. ER000824-25. Uber further argued that drivers may actually be harmed if reclassified as employees under state law, on the premise that drivers' access to these benefits under the Families First Coronavirus Act ("FFCRA") and the Coronavirus Aid, Relief, and Economic Security ("CARES") Act could be jeopardized if drivers were reclassified under state law.

These assertions were incorrect, both legally and factually. First, the federal legislation was meant to supplement, not supplant, basic state law employee protections.[32] Second, whether drivers can access benefits provided by the emergency federal legislation is determined under federal law, and therefore employee status under (more stringent) state law would

[32] See Pub. L. No. 116-127, 134 Stat. 178, § 5107 (FFCRA), Rules of Construction ("Nothing in this Act shall be construed (1) to in any way diminish the rights or benefits that an employee may be entitled to under any (A) other Federal, State, or local law … or (C) existing employer policy."); see also 85 Fed. Reg. 19326 (pub. Apr. 6, 2020) (to be codified at 29 C.F.R. § 826) [hereinafter "Paid Sick Leave Rule"], C.F.R. § 826.160(a) (a worker's "entitlement to, or actual use of, Paid Sick Leave under the [Emergency Paid Sick Leave Act, div. E of the FFCRA] is in addition to—and shall not in any way diminish, reduce, or eliminate—any other right or benefit including regarding Paid Sick Leave, to which the [worker] is entitled under any of the following: (i) Another Federal, State, or local law, except the FMLA as provided in § 826.70; ….") (emphasis added); id. § 826.160(b) ("Sequencing of Paid Sick Leave. (1) A[] [worker] may first use Paid Sick Leave before using any other leave to which he or she is entitled by any: (i) other Federal, State, or Local law; ….") (emphasis added).

not affect drivers' access to these federal benefits.[33] Third, the federal benefits were hastily thrown together and proved difficult to obtain; it was not realistic that Uber drivers would receive the loans or tax credits (and

[33] It is well recognized that it is more difficult to prove employee status under federal law than under the Massachusetts "ABC" test. While the "ABC" test requires the alleged employer to prove all three prongs of the test, federal tests involve balancing of multiple factors. The Department of Labor has recently issued an opinion letter finding gig workers not to be employees, Opinion Letter, FLSA2019-6, Dep't of Labor (dated Apr. 29, 2019), and the federal IRS test considers 21 factors. See 26 CFR § 31.3401(c); see generally James L. Rigelhaupt Jr., Annotation, *What Constitutes Employer–Employee Relationship for Purposes of Federal Income Tax Withholding,* 51 A.L.R.Fed. 59 § 19 (1981 & Supp.1990). Indeed, the California Supreme Court adopted the Massachusetts "ABC" test in Dynamex specifically with the goal of making it easier for workers to obtain employee protections under California law than under multi-factor tests. Dynamex, 4 Cal.5th at 964.

Moreover, the Massachusetts SJC has recognized that workers can be classified differently under different tests. See Ives Camargo's Case, 479 Mass. 492, 495-96 (2018) (holding workers to be independent contractors under multi-factor workers comp test, even though they would be employees under "ABC" wage law test). In Massachusetts, a federal court considering the same injunction request brought by Lyft drivers flatly rejected the argument that classification of drivers as employees under state law could jeopardize, or have any impact at all on, the drivers' classification for the purpose of obtaining emergency federal benefits. See Cunningham v. Lyft, Inc., 2020 WL 2616302, at * n. 7 (D. Mass. May 22, 2020) ("That each statutory scheme provides its own requirements as to whether a worker is covered as an employee under the particular statute undermines Lyft's contention that awarding drivers earned sick time under M.G.L. c. 149, § 148C could have a detrimental effect on the drivers' ability to access new federal and state benefits.").

what they need is cash, not tax credits).[34] ER00081-84. And now those benefits are set to expire.[35]

None of Uber's arguments effectively refute the assertion that state-mandated paid sick leave provides vital protection, which could have prevented earlier transmissions of COVID-19; which could still provide

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[34] The tax credits and small business loans required applicant sophistication, which Plaintiffs showed evidence would make them particularly difficult for Uber drivers to obtain. See generally "Covid-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs," IRS (accessed Apr. 7, 2020); available at: https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-providedby-small-and-midsize-businesses-faqs#basic. ["IRS FAQs"]; Small Business Administration, "COVID-19 Economic Injury Disaster Loan Application," Disaster Loan Assistance Portal, OMB Control # 3247-0406, available at: https://covid19relief.sba.gov/ (discussed ER00083-84). Indeed, the S.B.A. applications proved difficult for even sophisticated applicants to access, given that the first round of funding ran out and the website promptly crashed upon opening applications to a second round. See Stacey Cowley, *Bankers Rebuke S.B.A. as Loan System Crashed in Flood of Applications*, N.Y. Times, Apr. 27, 2020, https://www.nytimes.com/2020/04/27/business/sba-loan-system-crash.html.

Plaintiffs provided declarations and articles confirming difficulties in Uber drivers accessing these federal benefits, including emergency federal loans, tax credits, and unemployment benefits. See Declarations of Abdulwahab Odunga, Reynaldo Fuentes, and Anne Kramer. ER000114-ER000134. See also Dkts. 80-11-14 (documenting that state unemployment offices were simply overrun with unemployment applications and unable to process the applications and provide benefits in a timely manner). Even once drivers were able to start accessing unemployment benefits, they are for a limited time period, and state-mandated sick pay is crucial for them to be able to continue to stay home and not work, and thus protect themselves and the public during the pandemic.

[35] *Advisory: Unemployment Insurance Program Letter No. 15-20*, U.S. Dep't of Labor, April 4, 2020, https://wdr.doleta.gov/directives/attach/UIPL/UIPL_15-20.pdf (stating that the Pandemic Unemployment Compensation Program is set to expire on or before July 30, 2020).

added protection by being layered atop the federal benefits; and which may eventually provide the only life-saving, sick leave protections when the federal benefits expire. Even if MESTL does not provide a full two weeks (80 hours) of paid sick leave, the sick leave provided may make it financially feasible (when it otherwise would not be) for drivers to self-quarantine for two weeks, if needed due to potential exposure.[36] Even if the state-mandated paid sick leave only keeps a driver off the road for a few days they would otherwise work, this leave could stave off irreparable harm by preventing further transmission of the disease. And even if not all Uber drivers in Massachusetts qualify for the full 40 hours of accrued leave, providing the state-mandated sick leave would provide thousands of Uber drivers in Massachusetts with added financial ability to stay home, which continues to be crucial to preventing irreparable harm by stemming further transmission of the virus.

[36] For drivers who split their time equally between Lyft and Uber, both companies' compliance with MESTL may provide the drivers with 40 hours of paid sick law from each and actually enable a full two-weeks (paid) quarantine.

3. Plaintiffs have established that the harm to Uber drivers and the public outweighs any harm to Uber should an injunction issue and that the public interest weighs in favor of issuing an injunction

The final two factors in the preliminary injunction analysis indisputably favor the issuance of a preliminary injunction. The balancing of equities factor is measured by examining "interest of all parties and weigh[ing] the damage to each." L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 634 F. 2d 1197, 1203 (9th Cir. 1980). Here, there can be no serious contention that the harms outlined above outweigh any harm to Uber of being made to comply with a law that pre-dates its arrival in the Commonwealth. At the end of February, on the precipice of the pandemic, Uber CEO, Defendant-Appellee Dara Khosrowshahi, reported to investors that Uber had $10 billion in unrestricted cash on hand to help weather the pandemic.[37] Uber cannot claim that it cannot afford to pay its drivers in compliance with the law, and profiting from illegal activity is not an argument against compliance. See Maplebear, Inc., Case No. 2019-48731, at *4 (Ex. B to RJN) (granting a preliminary injunction enjoining Instacart's from classifying its workers as independent contractors; "It bears repeating

[37] Jessica Bursztynsky, *Uber Stock Skyrockets After CEO Says It Has Plenty of Cash to Get Through Coronavirus Crisis*, CNBC, March 19, 2020, https://www.cnbc.com/2020/03/19/uber-stock-pops-after-saying-worst-of-coronavirus-fallout-is-behind-it.html.

that the [adoption of the "ABC" test in Dynamex] is now nearly 2 years old. While change is hard, defendant cannot legitimately claim surprise or that it has not had time to adjust its business model.").

As to the public interest, the foregoing discussion makes plain that the public interest weighs in favor of enjoining Uber's misclassification of its drivers as independent contractors. It is unquestionably in the public interest to ensure compliance with Massachusetts law, which will help stem the spread of a global pandemic that has already killed millions. The Massachusetts Attorney General's agreement that Uber should be ordered to classify its drivers as employees in order to ensure that they can comply with public health directives and prevent further harm to public health only confirms this fact.

The pandemic is far from over; Plaintiffs again urge that the judiciary recognize the imminent and ongoing harm to the public in light of Uber's continued evasion of Massachusetts law and the serious threat to public health that this practice presents. Plaintiffs have demonstrated that Uber is violating numerous provisions of the Wage Act; that these violations have resulted and continue to result in irreparable harm to its drivers and the public; and that Uber will not suffer if made to abide by the law and reclassify its drivers, but that the public will suffer in the absence of

reclassification. For all these reasons, Plaintiffs have met their burden for a preliminary injunction to issue.

III. Even if the District Court Needed to Address Uber's Motion to Compel Arbitration Before Considering Plaintiffs' Motion for Preliminary Injunction, the District Court Erred in Granting Uber's Motion to Compel Arbitration

Uber argued below that the District Court could not consider Plaintiffs' preliminary injunction request, much less issue relief, because their claims could only proceed in individual arbitration. Uber protested that the District Court was without power to issue any relief that altered that status quo because, it argued, to do so would invade the province of the arbitrator.

There are two reasons why Uber's arbitration clause should not have prevented the issuance of a preliminary injunction below, or at the least, two reasons Plaintiffs were likely to succeed in – or raised substantial questions on the merits – overcoming Uber's arbitration clause, which should have been enough for Plaintiffs to obtain the preliminary injunction. First, Uber cannot wield its arbitration clause to block the issuance of "public injunctive relief." See infra, Part III(A)-(B). Second, Uber drivers are exempt from the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, under the transportation worker exemption to the Act. See infra, Part III(C).

A. Massachusetts Law Would Follow the California McGill Rule, Which Prohibits Defendants From Wielding an Arbitration Agreement to Prevent Pursuit of Public Injunctive Relief

In McGill v. Citibank, N.A., 2 Cal. 5th 945, 956 (2017), the California Supreme Court held that the right to pursue public injunctive relief could not be waived wholesale through a predispute arbitration agreement.[38] The Court defined public injunctive relief as "injunctive relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public." Id. at 951.[39] The "evident purpose" of public

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[38] In reaching this conclusion, the Court built on the Broughton-Cruz rule, see Cruz v. PacifiCare Health Systems, Inc., 30 Cal.4th 303, 315-16 (2003), and Broughton v. Cigna Healthplans of Cal., 21 Cal.4th 1066, 1077 (1999), which established that agreements to arbitrate claims for public injunctive relief brought pursuant to the Consumer Legal Remedies Act ("CLRA") Cal Civ. Code§§ 1750 et seq., the Unfair Competition Law ("UCL") Cal Bus. & Prof. Code §§17200 et seq., or the false advertising law, are not enforceable in California. Id. at 956. The Broughton-Cruz rule established that public injunctive relief could not be thwarted through arbitration; the McGill rule further established that public injunctive relief cannot be waived wholesale through a predispute arbitration agreement, making the rule one of general applicability (rather than specific to the arbitral forum).

[39] Although "public injunctive relief" is not expressly provided for under the California statutes, the Supreme Court recognized the availability of this relief under the broadly written provisions. Indeed, in McGill, the Court held that, even after statutory amendments stripped from the UCL express language allowing a suit by "any person acting for the interests of … *the general public*", the remaining broad language still allowed for a private litigant to seek public injunctive relief, so long as that litigant met standing requirements. Compare McGill, 2 Cal. 5th at 598-99 (discussing amendments to UCL through Prop. 64) with Cruz, 30 Cal. 4th at 315 (quoting the earlier "general public" language of the UCL).

injunctive relief is "to remedy a public wrong." Id. at 961 (quoting Broughton, 21 Cal. 4th at 1080). McGill held that pursuit of public injunctive relief could not be waived through a predispute arbitration agreement because such waiver "would seriously compromise the public purposes the statutes were intended to serve." Id.[40]

Plaintiffs submit that, if presented with this question, the Massachusetts Supreme Judicial Court would recognize that Massachusetts law, like California law, provides for public injunctive relief that cannot be foreclosed altogether through the use of an arbitration clause.[41] Indeed, the Massachusetts Attorney General has agreed that the Massachusetts Wage Act, Independent Contractor, and Earned Sick Time laws allow aggrieved employees to seek public injunctive relief under the provision of M.G.L. c.

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[40] In Blair v. Rent-A-Ctr., Inc., 928 F.3d 819, 827 (9th Cir. 2019), the Ninth Circuit held that the McGill rule against waivers of public injunctive relief is not preempted by the FAA because it "is a generally applicable contract defense."

[41] The McGill rule was not clear under California law prior to the California Supreme Court's pronouncement in McGill, which adjusted the Broughton-Cruz rule. And the Broughton-Cruz rules was totally unknown until announced the California Supreme Court announced the rule in 1999 in Broughton. Similarly, only the Massachusetts Supreme Judicial Court can confirm that Massachusetts law would follow McGill, meaning that, should this appeal turn on the question, this Court should certify the issue to the SJC. See SJC Rule 1:03.

149 § 150. The Attorney General correctly emphasized the public purpose of the Independent Contractor and Earned Sick Leave laws. ER000847-49.[42]

The Attorney General noted that the plain language of the enforcement provisions of the Massachusetts Wage Act mirror the provisions of the CLRA, one of the consumer protection statutes at issue in McGill. ER000851. Compare Cal. Civ. Code § 1780(a) ("Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful [under the CLRA] may bring an action against that person to [] obtain… (2) An order enjoining the methods, acts, or practices.") with M.G.L. c. 149, § 150 ("An employee claiming to be aggrieved [under the Wage Act, may] institute and prosecute… a civil action for injunctive relief).[43] Importantly, the Wage Act provides parallel private enforcement mechanisms under M.G.L. c. 148 § 150. ER000842-43 ("because the Attorney General's resources are limited,

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[42] Notably, the purpose of the Independent Contractor Law mirrors that of the consumer protection statutes at issue in McGill: it aims to prevent businesses from engaging in unfair competition and to prevent injury to the economy due to unlawful business practices. See Kasky v. Nike, Inc., 27 Cal. 4th 939, 949 (2002) (discussing the UCL); Broughton, 21 Cal. 4th at 1077 (discussing the CLRA).

[43] The Attorney General further points to the enforcement provision of the Independent Contractor Law, which states that: "Nothing in this section shall limit the availability of other remedies at law or in equity." M.G.L. c. 149 § 148B(e). JA000397. This language also mirrors the CLRA. See Cal. Civ. Code § 1752.

the Attorney General recognizes that individuals must often play a meaningful role in vindicating their own rights and ensuring compliance within the business community–not only to protect themselves, but also to expand compliance across entire industries."); see also Melia v. Zenhire, Inc., 462 Mass. 164, 170 n. 7 (2012) (noting the Act "provides for both public and private enforcement"); Depianti, 465 Mass. at 611-12. In light of her office's limited resources, the Attorney General expressed concern the hamstringing of private enforcement efforts by defendants' aggressive use of arbitration agreements will undercut the Wage Act and thus encourages the recognition of public injunctive relief that cannot be thwarted through arbitration. ER000844. In short, the Attorney General offers a reasonable analysis of the statutory scheme of the Wage Act as providing for public injunctive relief. That reasonable analysis is entitled to deference, and the District Court erred holding otherwise.[44]

The District Court simply followed the previous, erroneous analysis set forth in the District Court's prior order denying Plaintiff's first preliminary injunction request – which was decided *before* the court had the

[44] The District Court correctly concluded that there was no "clear[] and unmistakabl[e]" delegation clause and it was thus for the Court to consider whether Plaintiffs' public injunction claim could be compelled to arbitration. [Order at 6 (citing AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986).].

benefit of the Massachusetts Attorney General's opinion that the Wage Act *does* provide for public injunctive relief; further, in that earlier decision, the court did not consider a claim for paid sick leave and the enormous harm to the public of denying Uber drivers paid sick leave during this unprecedented pandemic. See ER000020 (citing D. Ct. Dkt. 41 at 4]).

In any event, Judge Talwani's earlier order denying Plaintiffs' first motion for preliminary injunction, which the District Court relied on here, was incorrect. In the prior order, Judge Talwani short-circuited the McGill analysis by summarily concluding that Wage Act could not provide for public injunctive relief simply because it did not include an express provision to that effect.[45] And that analysis has now been corrected by the Massachusetts Attorney General.

This Court should now hold – or certify to the SJC to determine – that Massachusetts wage law allows for public injunctive relief.

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[45] This conclusion is also expressly at odds with the holding in McGill that the statute need not include such a provision in order to afford public injunctive relief. Judge Talwani compounded the error by implying that, because the Wage Act "contemplates class-wide relief but includes no provisions that allow for injunction for the public benefit," that public injunctive relief was unavailable under the statute. ER000007. However, in California, both the UCL and CLRA provide private litigants with the ability to seek class-wide relief, but the provision of class-wide relief did not even enter into the California Supreme Court's analysis on whether the statute allows for public injunctive relief. See Broughton, 21 Cal. 4th at 1077; McGill, 2 Cal. 5th at 598-59.

B. Plaintiffs' Request for an Injunction Constitutes a Request for Public Injunctive Relief

After concluding that public injunctive relief was not available under the statutory scheme of the Massachusetts Wage Act, the District Court went on to opine in dicta that Plaintiffs "face[d] an uphill battle even if McGill applied." ER000021. But the Court did not rely on its own analysis; it merely pointed to distinguishable case law that is non-binding on this Court.

The District Court cited to two California cases in its order: Magana v. DoorDash, Inc., 343 F. Supp. 3d 891, 901 (N.D. Cal. 2018), and Clifford v. Quest Software Inc., 38 Cal. App. 5th 745, 755 (Ct. App. 2019). However, these rulings should not be read as foreclosing public injunctive relief under the dire circumstances presented here, and when plaintiffs pursue claims for injunctive relief pursuant to public health laws.

To begin with, neither case addressed a company's denial of state-mandated paid sick leave for employees during a public pandemic, making these rulings fundamentally inapplicable as neither presented the obvious urgency of the request at issue here. Taking each in turn, Magana merely concluded (with scant analysis) that the plaintiff's request for an injunction against DoorDash's misclassification of its workers as independent contractors did not constitute a "public injunction" because the harm to the public based on the alleged misclassification was too attenuated. Magana,

343 F.Supp. 3d at 901. And Clifford did not address an independent contractor claim at all, but rather addressed an overtime misclassification claim, which does not carry the attendant harm and complete deprivation of basic employee protections, like paid sick leave.[46] The District Court did not grapple with the newly presented question here, regarding a company's denial of paid sick leave during a pandemic, choosing instead to cite to incorrect analysis from analogous decisions in a case against Lyft, where drivers also sought a preliminary injunction (albeit under California law) and which is now on appeal.[47]

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[46] Clifford v. Quest Software Inc., 38 Cal. App. 5th 745, 755 (Ct. App. 2019), which concluded that a plaintiff seeking overtime pay for a class of workers, did not seek public injunctive relief.

[47] In Rogers v. Lyft Inc., Case No. CGC-20-583685 (Sup. Ct. Cal.), Plaintiffs similarly sought to enjoin Lyft's misclassification of its California drivers during the pandemic. The state Superior Court denied the request based on the incorrect conclusion that it was bound by the Court of Appeal's decision in Clifford and largely following the federal court's analysis that was set forth in *dicta* when the federal court denied Lyft's motion to compel arbitration of the public injunctive relief claim and remanded the claim to state court. Case No. CGC-20-583685, at *5-8 (Sup. Ct. Cal., April 30, 2020) [Docket No. 92-1].

In dicta set forth in Rogers v. Lyft, Inc., 2020 WL 1684151, at *3, 18 (N.D. Cal. Apr. 7, 2020), the federal court appeared taken with statistics that a large portion of gig economy drivers had not accrued enough hours to qualify for paid sick leave under California state law and that, even for those who qualify, California's paid sick leave law only provided a maximum of 24 hours of paid leave; the court also seemed taken by Lyft's professed concern that drivers might lose out on the opportunity to receive federal emergency benefits. This latter concern is flatly incorrect, as explained supra Part II(B)(2). As to the former concern, the fact that a large portion of drivers had not accrued sufficient hours to accrue paid sick leave does not negate that the fact that, given that there are hundreds of thousands of

Common sense dictates that an injunction that would prevent further harm to public health, by enforcing a state-mandated paid sick leave and thereby stemming the spread of a global pandemic, constitutes public injunctive relief. See McGill, 2 Cal. 5th at 951 (defining public injunctive relief as "injunctive relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public.") (emphasis supplied).[48] The pandemic has all too plainly taught us that harming workers' health by denying paid sick leave is not a "private dispute" but constitutes a "public wrong" that puts us all in danger. The

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drivers, even if only tens of thousands of them are eligible for paid sick leave, providing those drivers with this benefit will certainly promote public health by allowing those drivers to stay home for additional days. And under Massachusetts law, drivers can accrue up to 40 hours of paid sick leave, which may stretch across two or more weeks of work for drivers who work part-time (for example, splitting time between Lyft and Uber). See 940 C.M.R. § 33.02 (mandating part-time workers accrue sick leave).

In any event, both the federal and state decisions in that case are now on appeal. See Rogers v. Lyft, Inc., Case No. 20-15689 (9th Cir.); Rogers v. Lyft, Inc., Case No. A160182 (Cal. App. Ct. 1st Dist.).

[48] In McGill, the plaintiff sought to enjoin Citibank's marketing of its "credit protector" plan, which promised to defer (or credit) credit payments when a qualifying event like the loss of employment occurred. 2 Cal. 5th at 952. McGill sued Citibank in 2011 for its marking of the plan and mishandling of her claim under the plan when she lost her job in 2008. Id. at 953. In other words, McGill sought to enjoin an unlawful business practice that put her, and other consumers, in a financially precarious position, having relied on the plan to offer deferment or credit as promised, in the event of job loss. Similarly, here Plaintiffs seek to enjoin an unlawful business practice that engenders financial insecurity and endangers the health of those swept into Uber's business model – drivers, passengers, and the public at large, who face a heightened risk of contracting COVID-19 because of the ways in which drivers may spread the disease.

Massachusetts Attorney General in submitting her amicus and otherwise "encouraging employers to allow employees liberal access to all forms of employee paid leave to facilitate compliance with governmental public health recommendations" during the pandemic, has confirmed that MESTL, like other state paid sick leave laws, has the public purpose of safeguarding public health. ER000848-49 (citing also Attorney General's Frequently Asked Questions About COVID-19: Employee Rights and Employer Obligations, Guidance for Employers and Employees During the Coronavirus Public Health Emergency, https://www.mass.gov/service-details/frequently-asked-questions-about-covid-19-employee-rights-and-employer-obligations). The statute is broadly worded, embedded in an Act that has been expansively construed, and which the Attorney General agrees provides for public injunctive relief. However, as in California, only the Massachusetts Supreme Judicial Court can confirm that public injunctive relief is available (more generally) under Massachusetts law and specifically under the Wage Act and to Plaintiffs here.

The number of drivers who contributed to the spread of COVID-19 in the Commonwealth because they, like Plaintiffs El Koussa and Leonidas, felt sick but continued to drive due to lack of paid sick leave, and the harm inflicted on the Commonwealth remains untold. Denial of paid sick leave

has been conclusively established as contributing to the spread of viruses, resulting in calls from legislators and agencies for companies to provide paid sick leave during the pandemic as part of public health efforts to beat back the coronavirus, see supra pp. 13-14. Lack of paid sick leave may have caused (and may continue to cause) preventable deaths. There is no reason to allow this threat to continue. Uber's practice of denying paid sick leave by misclassifying its drivers should be enjoined now.

C. Uber's Motion to Compel Arbitration Should Also Have Been Denied Because Uber Drivers Fall Under the Transportation Worker Exemption to the Federal Arbitration Act

As an alternative basis for denying Uber's motion to compel arbitration, the District Court should have recognized that Uber drivers fall within the transportation worker exemption to Federal Arbitration Act ("FAA"), 9 U.S.C. § 1.[49] To qualify for the Section 1 transportation worker exemption from the FAA, an individual: (1) must work for a business pursuant to a "contract of employment"; (2) be a "transportation worker"; and (3) be "engaged in interstate commerce." Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001) (citing Circuit City Stores,

[49] The exemption provides that the FAA shall not "apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The law is now clear that the applicability of this exemption is for a court to determine, not an arbitrator. See Oliveira v. New Prime, Inc., 139 S. Ct. 532, 538 (2019).

Inc. v. Adams, 532 U.S. 105, 118 (2001)). Here, the District Court properly found that "[t]he critical issue" is the third factor – namely, "whether Uber drivers are 'engaged in interstate commerce.'" ER000014.[50]

However, the District Court erred in its analysis of this factor by erroneously concluding that Uber drivers are not engaged in interstate commerce within the meaning of Section 1, notwithstanding the fact that some Uber drivers do transport drivers across state lines and that many Uber drivers routinely transport passengers to and from airports, bus terminals,

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[50] It is clear that drivers have a "contract of employment" with Uber, despite being classified as independent contractors. New Prime, Inc., 139 S. Ct. at 538, 543-44 (holding that "contracts of employment" include contracts of both employees and independent contractors).

The District Court was also correct in concluding that Uber drivers are "transportation worker[s]" within the meaning of Section 1. The Third Circuit recently held that workers who transport *passengers* may qualify under this second prong, in addition to workers who transport goods. Singh v. Uber Technologies, Inc., 939 F.3d 210, 221 (3d Cir. 2019) ("nothing in the residual clause of § 1 suggests that it is limited to those who transport goods, to the exclusion of those who transport passengers" and "[i]n fact, the text indicates the opposite."). Other courts applying this holding to "rideshare" drivers like the plaintiffs here have concluded that they do qualify as "transportation workers" within the meaning of Section 1 even if they transport passengers rather than goods. See Rogers v. Lyft, Inc., 2020 WL 1684151, at *5 (N.D. Cal. Apr. 7, 2020) ("Section 1 is not limited to classes of workers who transport goods in interstate commerce…the goods-passengers distinction is nowhere to be found in the statutory text, which refers to 'foreign or interstate commerce.'"); Cunningham v. Lyft, Inc., No. 1:19-CV-11974-IT, 2020 WL 1503220, at *4-6 (D. Mass. Mar. 27, 2020) (noting that "the RLA amendment to which the [Supreme] Court referred [in Circuit City] covered those engaged in transportation of goods and passengers.") (emphasis in original).

and the like as part of the passengers' continuous interstate journeys.[51] Numerous courts have recognized that workers may qualify as transportation workers "engaged in interstate commerce" within the meaning of Section 1, even if they themselves do not cross state lines, but instead transport goods (or passengers) who cross state lines "within the flow of interstate commerce." See, e.g., Waithaka v. Amazon.com, Inc., 404 F. 3d 335, 340-44 (D. Mass. Aug. 20, 2019) (holding "gig economy" last-mile delivery drivers for Amazon were exempt, even where deliveries occurred entirely within the state of Massachusetts), appeal pending Case. No. 19-1848 (1st Cir.); Rittmann v. Amazon.com, Inc., 383 F. Supp. 3d 1196, 1201 (W.D. Wash. 2019) (same), appeal pending, Case No. 19-35381 (9th Cir.); Nieto v. Fresno Beverage Co., Inc., 33 Cal. App. 5th 274, 281-85 (Cal. Ct. App. 2019), reh'g denied (Mar. 27, 2019) (intrastate liquor delivery driver who transported items solely within California found to be exempt under Section 1); Bacashihua v. U.S. Postal Serv., 859 F.2d 402, 405 (6th Cir. 1988) (postal worker, who made only intrastate deliveries, wasengaged in interstate commerce); Palcko v. AirborneExpress, Inc., 372 F.3d 588, 593-94 (3rd Cir. 2004) (supervisor who merely supervised drivers making intrastate deliveries

[51] Whether Uber drivers are "engaged in interstate commerce" is analyzed in reference to the class of workers that the individual belongs to, rather than the particular work of the individual plaintiff. See Singh, 939 F.3d at 227; Bacashihua v. U.S. Postal Service, 859 F.2d 402, 405 (6th Cir. 1988).

in the "Philadelphia area" was exempt); Hamrick,et al. v. US Pack Holdings, LLC, et al., Civ. A. No.6:19-cv-137 (M.D. Fla. August 15, 2019) Dkt. 88, at *4 (Dkt. 16.02) (holding that delivery drivers who "predominately make local deliveries and rarely cross state lines in the ordinary course of their employment" were exempt under Section 1).[52] As set forth further below, this extensive authority builds on the decisions by the Supreme Court at the time of the FAA's passage, as well as Supreme Court authority interpreting the Section 1 exemption itself, all of which makes clear that the phrase "engaged in interstate commerce" refers to workers who transport goods or passengers "within the flow of interstate commerce."

In Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 116 (2001), the Supreme Court interpreted the phrase "engaged in commerce" in Section 1 of the FAA and noted that phrases such as "in commerce" or "engaged in commerce" were "often-found words of art…." The Circuit City Court cited

[52] See also Muller v. Roy Miller Freight Lines, LLC, 23 Cal. App. 5th1056, 1065-69 (Cal. Ct. App. 2019) (holding that even though Plaintiff truckdriver only transported goods within California and "was not personally transporting goods from state to state, he played an integral role in transporting those goods through interstate commerce."); Christie v. Loomis Armored US, Inc., 2011 WL 6152979, *3 (D. Colo. Dec. 9, 2011) (intrastate currency delivery driver found to be exempt under Section 1); Ward v. Express Messenger Sys. Inc. dba Ontrac, Civ. A. No. 1:17 -cv-02005 (D. Co. Jan. 28, 2019), Dkt. 118 (intrastate "last-mile" delivery driver who worked entirely within Colorado found to be exempt under Section 1).

favorably to "a pair of cases decided in the 1974 Term concerning the meaning of the phrase 'engaged in commerce' in § 7 of the Clayton Act", noting that the court has "held that the phrase 'engaged in commerce'…'means *engaged in the flow of interstate commerce*…'" Id. at 117 (citing United States v. American Building Maintenance Industry, 422 U.S. 271 (1975) at 283) (emphasis added). Elsewhere, the Circuit City Court again cited Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195 (1974), for the proposition that the "phrase 'engaged in commerce' 'appears to denote only persons or activities *within the flow of interstate commerce*.'" Id. at 117–18 (emphasis added); see also id. at 118 (citing Gulf Oil Corp., 419 U.S. at 195 (noting that the "engaged in commerce" language "denote[s] only persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer.")).

Moreover, in interpreting Section 1 of the FAA, the Supreme Court recently noted that "it's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary ... meaning ... *at the time Congress enacted the statute*.'" New Prime Inc., 139 S. Ct. at 539 (quoting Wisconsin Central Ltd. v. United States, 138 S.Ct. 2067, 2074 (2018)) (emphasis added). Here, to be "engaged in interstate commerce" at

the time of the FAA's passage in 1925 meant generally that one participated in the trafficking of goods or passengers between different states (or countries)[53]; however, "interstate commerce" was also understood at the time to encompass intrastate transportation of goods that were bound for out-of-state or coming from out-of-state (or even work that did not involve the physical transportation of goods at all where that work was "so closely related to" interstate transportation "as to be practically a part of it."). See Baltimore & O. S. W. R. Co. v. Burtch, 263 U.S. 540, 542, 544 (1924). Thus, a "class of workers engaged in foreign or interstate commerce" in 1925 would be understood to include workers transporting goods or passengers within the flow of interstate commerce even if they themselves did not physically cross state lines (i.e. workers transporting passengers within a single state as part of a larger interstate journey).

Cases decided under the Federal Employers' Liability Act (FELA) illustrate Congress's understanding of the phrase "engaged in interstate commerce" in the years leading up to the FAA's passage. For example, in Philadelphia & R.R. Co. v. Hancock, 253 U.S. 284, 285 (1920), the Supreme

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[53] See Noah Webster, Webster's Collegiate Dictionary 333 (3d ed. 1918) (defining "engaged" as "[o]ccupied; employed"); see also The Century Dictionary: An Encyclopedic Lexicon of the English Language 1929 (1914) (defining "engage," in relevant part, as "[t]o occupy one's self; be busied; take part").

Court held that that even where "[t]he duties of [a train crew member] never took him out of Pennsylvania", and he solely transported coal to a destination two miles away, he was nonetheless engaged in interstate commerce under FELA because the coal he was transporting was bound for another state. Similarly, in Burtch, the Supreme Court held that workers who unloaded freight from trains that had transported the freight from out of state were engaged in interstate commerce because the work was "so closely related to" interstate transportation "as to be practically a part of it." 263 U.S. at 544. Both Burtch and Hancock demonstrate that the analysis (as Congress would have understood when it enacted the FAA) focuses *on the flow* of goods or passengers interstate. Here, as in Burtch and Hancock, Uber drivers routinely transport passengers within the flow of interstate commerce by taking them to or picking them up from the airport, train station or bus terminal as one part of a larger, continuous interstate journey. ER000732-33, ¶¶ 4-5; ER000248, ¶¶ 31-32; ER000878, ¶ 6 ("I frequently pick up riders at the airport."); ER000881, ¶ 6 (describing "a lot of riders from the airport").

Following this line of authority interpreting the phrase "engaged in interstate commerce," a federal court in Massachusetts reached the same conclusion, concluding that drivers for Uber's competitor, Lyft, were

"engaged in interstate commerce" within the meaning of Section 1 because they transported passengers within the flow of interstate commerce even when they did not ever cross state lines. Cunningham v. Lyft, Inc., No. 2020 WL 1503220, at *6-7 (D. Mass. Mar. 27, 2020), appeal pending, Case No. 20-1357 (1st Cir.). The Cunningham court concluded that Lyft drivers "help facilitate [passengers'] movement, as the first or last leg of the journey, including into or out of Massachusetts… Therefore, the Lyft drivers are part of the chain of interstate commerce, enabling their passengers to leave or enter Massachusetts." Id. at *7 (internal citation omitted).[54]

Here, as in the Cunningham case, the record showed that more than 10% of Uber trips nationally, and 9.1% of Uber trips in Massachusetts were

[54] In Cunningham, the court also considered the eight factors set forth by the Eighth Circuit in Lenz v. Yellow Transp., Inc., 431 F.3d 348 (8th Cir. 2005), as modified to consider transportation of passengers, and found "a number of the factors" were met: "Plaintiffs works in the transportation industry. The vehicles that Plaintiffs use are central to Plaintiffs' job duties and are vital to Lyft's commercial enterprise. There is also a complete nexus between Plaintiffs' duties and the vehicle they respectively use to carry out those duties." 2020 WL 1503220, at *7. Because the court found that Lyft drivers directly continued the flow of interstate commerce (that facilitating the flow of interstate commerce through intrastate trips was not "incidental" to the work of Lyft drivers but "essential to their work"), the court found that the Lenz factors weighed in favor of finding that the drivers engaged in interstate commerce. Id. (holding that for transportation workers who transport passengers, the "critical question" is "whether they transport passengers that travel interstate."). Plaintiffs further submit that, with the growing importance of the "gig economy", a strike by Uber and Lyft drivers (and other similar gig workers) could very well now disrupt the national economy (seventh Lenz factor), further bolstering the court's conclusion in Cunningham.

to or from an airport in the year 2019 (to say nothing of numerous additional trips by Uber drivers to or from bus terminals and train stations). ER000732-33, ¶¶ 4-5; see also Zeninjor Enwemeka, *No More Curbside Pickups and Drop-offs For Uber And Lyft At Logan Airport*, WBUR (Oct. 28, 2019), available at: https://www.wbur.org/bostonomix/2019/10/28/uber-lyft-boston-logan-airport-relocation ("Uber and Lyft represent about 40% of the traffic at Logan Airport during peak times while taxis represent less than 4%"); *Rideshare in Massachusetts: 2018 Data Report*, Dep't of Pub. Utilities, available at: https://tnc.sites.digital.mass.gov (documenting *seven million* rides to and from Boston Logan International Airport in 2018 by "transportation network companies" like Uber and Lyft) (emphasis added). Thus, it is beyond dispute that Uber drivers routinely transport passengers within the flow of interstate commerce, as the Cunningham court correctly recognized with respect to Lyft drivers.

However, notwithstanding the highly persuasive reasoning of the Cunningham court and the numerous decisions cited above, the District Court nonetheless concluded that Uber drivers are not "engaged in interstate commerce", relying on a decision by another federal district court in Rogers v. Lyft, Inc., 2020 WL 1684151 (N.D. Cal. Apr. 7, 2020), appeal pending,

Case. No. 20-15689 (9th Cir.)[55]. In Rogers, the court largely relied on the Supreme Court's decision in United States v. Yellow Cab Co., 332 U.S. 218 (1947), overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984). There, in the context of a decision under the Sherman Anti-Trust Act, the Supreme Court concluded that Chicago taxicabs were not involved in the stream of interstate commerce "when local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service." Yellow Cab Co., 332 U.S. at 233.

Contrary to the district court's conclusion below, Yellow Cab does not control the transportation worker exemption analysis in this case. As set forth supra, p. 57, at the time Congress enacted the FAA in 1925, case law

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[55] In Rogers, Judge Chhabria of the Northern District of California concluded that the work of rideshare drivers "predominantly entails intrastate trips", characterizing "[i]nterstate trips that occur by happenstance of geography" as insufficient to render drivers "engaged in interstate commerce." 2020 WL 1684151 at *6. Having written off the fact that some drivers do transport passengers across state lines, the Rogers court also rejected the notion that the drivers' transportation of passengers on one leg of a larger interstate journey was sufficient to qualify them for the Section 1 exemption, notwithstanding the wealth of caselaw to the contrary. See supra, p. 54-55. The Rogers court held that "Lyft's focus" was not "transporting people to and from airports"; instead, the Rogers court concluded (and the district court here agreed) that the Supreme Court's decision decades earlier in Yellow Cab was dispositive of this case. Rogers, 2020 WL 1684151 at *6. But Yellow Cab is distinguishable for a number of reasons and does not control the outcome here, as set forth above.

under the Federal Employers' Liability Act, ("FELA"), 45 U.S.C. § 51, interpreted the phrase "engaging in interstate commerce" to include intrastate transportation that was one part of a continuous interstate journey or had a strong nexus with the interstate journey. See, e.g., Baltimore & O. S. W. R. Co. v. Burtch, 263 U.S. 540, 542, 544 (1924); Philadelphia & R.R. Co. v. Hancock, 253 U.S. 284, 285 (1920); see also Philadelphia & R R Co v. Polk, 256 U.S. 332, 334 (1921). Because these cases were decided shortly *before* the enactment of the FAA, they provide far more relevant guidance than Yellow Cab, which was decided several decades later. Furthermore, Yellow Cab is distinguishable on the facts. There, the Chicago ordinance explicitly limited the cab drivers to transportation within the city limits, see Yellow Cab, 332 U.S. at 230-31, whereas here, it is undisputed that Uber and Lyft drivers provide service anywhere and routinely cross city limits, sometimes even crossing state lines or international borders. See ER000248, ¶¶ 31-32; ER000732-33, ¶¶ 4-5; see also Monica Garske, *Uber's 'Passport' Service Offers Rides from San Diego to Mexico*, NBC San Diego, (March 17, 2016), available at: https://www.nbcsandiego.com/news/local/uber-product-launch-san-diego/60202/ (describing the launch of "Uber Passport" to take drivers from Mexico to San Diego).[56]

[56] In its flawed decision below, the District Court also cited to a line of

The District Court also erred in discounting the fact that some Uber drivers do transport passengers across state lines, which further distinguishes plaintiffs from the sort of purely "local" taxi drivers in Yellow Cab. Indeed, some courts have held that even if a small amount of a driver's work is across state lines, even that minor amount of interstate transportation is sufficient to qualify them for the Section 1 exemption. See Int'l Bhd. of Teamsters Local Union No. 50, 702 F.3d 954, 957 (7th Cir. 2012) (where truckers estimated making a few dozen interstate deliveries out of 1500 to 1750 deliveries each year, the court held that "[a]lthough Illini Concrete was primarily engaged in operations within Illinois, its truckers occasionally transported loads into Missouri. This means that the truckers were interstate

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cases involving the Section 1 exemption and so-called "gig economy" companies. See ER000018 (citing Magana v. DoorDash, Inc., 343 F. Supp. 3d 891 (N.D. Cal. 2018), Lee v. Postmates Inc., No. 18-CV-03421-JCS, 2018 WL 6605659 (N.D. Cal. Dec. 17, 2018), Wallace v. GrubHub Holdings Inc., No. 18 C 4538, 2019 WL 1399986, at *5 (N.D. Ill. Mar. 28, 2019)). But these cases, all involving local takeout food delivery, are all plainly distinguishable from this case. Unlike the takeout food delivery drivers in Postmates, DoorDash, and GrubHub, who deliver food from local restaurants to customers, the Uber drivers in this case routinely travel to and from the airport, bus terminals, and train stations, and they routinely transport passengers within the flow of interstate commerce. That their trips may comprise one leg of a larger interstate journey makes no difference, as the cases cited supra, p. 54-55 make clear.

Moreover, in the takeout food delivery cases, there was an argument regarding whether ingredients that are transported interstate come to rest and are reconstituted into takeout meals such that the continuous flow of interstate commerce is interrupted before the delivery drivers deliver the meals. See Levin v. Caviar, 146 F. Supp. 3d at 1154. Here, by contrast, passengers on a continuous interstate journey from one location to another do not implicate these same concerns; the passengers are not "transformed" or "reconstituted" in the same way as the food ingredients.

transportation workers within the meaning of § 1 of the FAA.") (emphasis added); Cent. States, Se. & Sw. Areas Pension Fund, 84 F.3d 988, 993 (7th Cir. 1996) (Section 1 exemption applied even where defendant was "primarily engaged in local trucking and *occasionally* transports cartage across state lines") (emphasis added); see also Vargas v. Delivery Outsourcing, LLC, 2016 WL 946112, at *4 (N.D. Cal. Mar. 14, 2016) ("Delivery drivers may fall within the exemption for 'transportation workers' even if they make interstate deliveries only 'occasionally.'"); see also Siller v. L & F Distributors, Ltd., 109 F.3d 765, *2 (5th Cir. 1997) (finding interstate commerce where only "approximately 39% of the truckloads … contained some out-of-state products"). Here, Uber admits that its drivers do sometimes cross state lines; Uber does not restrict cross-state trips and actively contemplates that riders will seek long trips, including those that involve cross border travel.[57] The District Court erroneously ignored this fact in this analysis below.

Instead, the District Court relied on Hill v. Rent-A-Ctr., Inc., 398 F.3d 1286 (11th Cir. 2005), for the proposition that occasional trips across state

[57] See Steven John, *'How Far Can an Uber Take You?' There isn't a distance limit for Uber rides, but there is a time limit — here's what you need to know*, BUS. INSIDER, Dec. 20, 2019, https://www.businessinsider.com/how-far-can-uber-take-you; *Requesting Long Trips*, UBER HELP, https://help.uber.com/riders/article/requesting-long-trips?nodeId=f7d602d3-f2c5-4d63-8395-83a8ea4c34d7; *What is the New Jersey (NJ) Surcharge?* UBER HELP, https://help.uber.com/riders/article/what-is-the-new-jersey-nj-surcharge?nodeId=6da7f14f-a2cc-438d-b82c-5225c239228e

lines are not sufficient to warrant application of the Section 1 exemption. See ER000016 (noting that some "courts have concluded that when transportation workers occasionally cross state lines, they may be interstate transportation workers within the meaning of § 1 of the FAA" while others like the Hill court have "declined to extend the exemption to workers who incidentally transported goods interstate as part of their job…") (internal citations omitted). But the Hill case is clearly distinguishable and does not stand for the proposition that the district court suggested; the Hill case involved an "account manager" for a business that rented furniture and appliances to customers on a 'rent-to-own' basis. Id. at 1288. The briefing makes clear that Hill's job duties included "calling customers when their accounts were past due[,]… answering phone calls, reviewing past due accounts, cleaning the showroom, restroom, work areas, and merchandise, making the merchandise available for rent after return from customers, and distributing brochures." See Brief of Defendant-Appellee, Hill v. Rent-A-Ctr., Inc., 2004 WL 3314614, *6 (C.A.11). Making "deliver[ies] of goods to customers out of state in his employer's truck" was merely one very small and "incidental" part of his overall job duties. Hill, 398 F.3d at 1288-89.

Thus, the Hill decision speaks to whether a worker qualifies as a "transportation worker" at all -- not whether he or she is "engaged in

interstate commerce." Indeed, what it means to be "engaged in interstate commerce" was not at issue in Hill; instead, the case holds that only a bona fide transportation worker in the *transportation industry* falls under the Section 1 exemption. Id. at 1289; see also Zamora, 2008 WL 2369769, *10 (describing the basis for the court's holding in Hill as being "that the employee was not employed in the transportation industry" and Hill was therefore "not relevant to the instant case," where plaintiff was a truck terminal manager).[58] In sum, Hill holds that an account manager for a furniture rental company does not work in the transportation industry and was not a "transportation worker" as that term is understood under 9 U.S.C. § 1. By contrast, there can be no question that Uber drivers are transportation workers employed in the transportation industry. Indeed, the very essence of Uber drivers' job is to transport passengers, as the District Court itself recognized in an earlier case. O'Connor v. Uber Techs., Inc., 82

[58] The portions of the decision quoted by the District Court make clear that the Eleventh Circuit was concerned primarily with sweeping up any sort of "worker employed by a company whose business dealings happen to cross state lines" such as a traveling pharmaceutical salesman or pizza delivery man, or in the case of Mr. Hill, an account manager for a furniture rental company. See ER000016 (quoting Hill, 398 F.3d at 1289). Here, Uber drivers are not employed in some other industry such as pharmaceuticals, restaurants, or furniture rentals; Uber drivers provide *transportation* services to passengers. Thus, Hill is inapplicable as the Cunningham court recognized. See Cunningham, 2020 WL 1503220 at *7 ("transportation work [in Hill] was incidental to the plaintiff's employment as an account manager; whereas here, Plaintiffs engage solely in transportation work, driving passengers on intrastate and interstate roads.").

F. Supp. 3d 1133, 1143 (N.D. Cal. 2015) (finding that "drivers are Uber's presumptive employees" because they provide transportation services to Uber and noting "Uber only makes money if its drivers actually transport passengers").

Furthermore, Uber drivers must be engaged in interstate commerce because, if they are not, then the FAA does not apply at all to their contracts and arbitration cannot be compelled. While Section 1 of the FAA exempts from the FAA's coverage transportation workers engaged in interstate commerce, Section 2 makes clear that any contracts must involve interstate commerce even to fall under the coverage of the FAA in the first place. As the Supreme Court recently affirmed in New Prime, "§ 1 helps define § 2's terms." New Prime, 139 S. Ct. at 537. If Lyft's contracts do not even involve interstate commerce in the first place, then pursuant to Section 2, the FAA does not apply at all, and arbitration cannot be compelled. See Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 454 (2012).

In sum, the District Court erred in finding Plaintiffs are not transportation workers engaged in interstate commerce and therefore exempt from the FAA. Some drivers transport passengers interstate (and even internationally to Mexico), and many more transport passengers within the continuous flow of interstate commerce, as one part of a larger, interstate

journey to and from the airport, bus terminal, or train station. Cases interpreting the phrase "engaged in interstate commerce" at the time of the FAA's passage make clear that intrastate journeys qualify as interstate commerce where they are one leg in a larger interstate journey, as is the case here. The federal district court in Cunningham recognized as much when it concluded that Lyft drivers are "engaged in interstate commerce" within the meaning of Section 1 because they "are part of the chain of interstate commerce, enabling their passengers to leave or enter Massachusetts" by transporting passengers "as the first or last leg of the journey, including into or out of Massachusetts." Id. at *7 (internal citation omitted). As in Cunningham, here, the District Court should have found that Uber drivers are "engaged in interstate commerce" because they are integral to modern-day interstate transportation.

Contrary to the District Court's ruling below, the Supreme Court's decision in Yellow Cab does not mandate a different result. That case, decided two decades after the FAA's passage, is not as persuasive as the FELA cases of the 1920's, which directly informed Congress's understanding of the phrase "engaged in interstate commerce" when the FAA was drafted. Moreover, Yellow Cab itself makes clear that whether transportation is within the flow of interstate commerce is highly contextual

and will be marked by "practical considerations." 332 U.S. at 231. Here, a practical approach counsels in favor of recognizing that in this day and age, like the "seamen" and "railroad employees" enumerated in Section 1, Uber drivers are a critical part of the interstate transportation system. For all these reasons, this Court should reverse and hold that Uber drivers are transportation workers under Section 1 of the FAA.

Moreover, if Uber drivers are exempt from the FAA under the transportation worker exemption, Uber cannot enforce its arbitration agreement under Massachusetts law because Massachusetts law (stripped of the overlay of federal preemption) does not allow enforcement of arbitration agreements containing class action waivers. See Feeney v. Dell Inc. ("Feeney I"), 454 Mass. 192, 196 (2009); Machado v. System4 LLC, 465 Mass. 508, 51617 (2013).[59] At least two courts have already held that, where drivers were exempt from the FAA under Section 1, Massachusetts

[59] The Massachusetts SJC has held that a class action waiver violates Massachusetts law and is unenforceable. Feeney I, 454 Mass. at 200-204. While the Feeney I rule was announced in a case involving consumers, the SJC later extended this holding to the employment context in Machado, 465 Mass. at 514. This rule was, however, later preempted by the FAA as a result of the U.S. Supreme Court's decisions in Concepcion and Italian Colors; see also Feeney v. Dell Inc. ("Feeney II"), 466 Mass. 1001 (2013). However, where FAA preemption does not apply (like here, where the plaintiffs fall outside the scope of the FAA due to the transportation worker exemption), Massachusetts state law prohibits class action waivers, thus rendering unenforceable an arbitration agreement that includes such a waiver.

state law prohibited the class action waivers in the drivers' agreements, rendering the agreements unenforceable. See Waithaka, 404 F. Supp. 3d at 348 ("[T]he FAA does not apply because Plaintiff's employment as a last-mile driver falls within the scope of the Section 1 transportation worker exemption. Accordingly, the Supreme Court's holdings in Concepcion and American Express do not narrow state public policy rationales for prohibiting class action waivers in arbitration agreements."); Cunningham, 2020 WL 1503220, at *8-9 (concluding that Lyft's arbitration agreement is unenforceable under Massachusetts law; "the court finds no basis for concluding that Feeney I's rule against class action waivers is abrogated where the FAA does *not* apply.") (emphasis added).

The same conclusion reached in Waithaka and Cunningham holds true here. Because the FAA does not apply, if the Court were to consider the enforceability of Uber's arbitration agreement under Massachusetts state law, the Court must conclude that the agreement is not enforceable because it does not allow for class actions to proceed in arbitration.

CONCLUSION

For the reasons discussed here, this Court should reverse the District Court's order below and enter an order requiring the entry of an appropriate preliminary injunction, enjoining Uber from continuing to flout Massachusetts law by misclassifying its drivers as independent contractors and thereby denying them paid sick leave. The District Court had the power to issue an injunction prior to ruling on Uber's Motion to Compel arbitration, and Plaintiffs met the four requirements for a preliminary injunction. Even if the District Court needed to first rule on the enforceability of the arbitration clause, it should have denied Uber's motion to compel arbitration, since Plaintiffs sought public injunctive relief and because Uber drivers are exempt under the FAA's Section transportation worker exemption.

The District Court should have granted Plaintiffs' motion for a preliminary injunction, and it should have denied Uber's motion to compel arbitration. This Court should reverse.

Respectfully submitted,

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on behalf of others similarly situated,

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UNITED STATES COURT OF APPEALS
For the Ninth Circuit
Appeal No. 20-16030

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Dated: July 13, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Nos. 20-16030

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I, Shannon Liss-Riordan, hereby certify that this brief was filed through the United States Court of Appeals for the First Circuit ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), including the following counsel of record for Defendants –Appellants:

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